U.S. Department of Labor

Office of Administrative Law Judges
603 Pilot House Drive - Suite 300
Newport News, VA 23606-1904

(757) 873-3099
(757) 873-3634 (FAX)

Issue date: 28Dec2001

Case No: 2000-LHC-2729

OWCP No: 5-106829

In the Matter of:

KENNETH DAWSON,
Claimant,

v.

CERES MARINE TERMINALS,
Employer.

Appearances:

Chanda Wilson Stepney, Esq.
For Claimant

Robert Rapaport, Esq.
For Employer

Before: FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim filed by Kenneth Dawson ("Claimant") against Ceres Marine Terminals Inc. ("Employer") for benefits under the Longshore and Harbor Workers' Compensation Act ("the act") as amended, 33 U.S.C. 901 et seq. Claimant seeks temporary total disability benefits from August 2, 1999 to the present and continuing. In addition, he seeks payment of medical bills for a psychological illness and injuries to his foot and back that, he argues, were caused or aggravated by working conditions. Employer responds that Claimant's current symptoms are unrelated to his August 1, 1999 injury and that he is capable of returning to work full duty.

A formal hearing was held before me at Newport News, Virginia on May 21, 2001, at which both parties were afforded a full opportunity to present evidence and argument as provided for by law and regulations. Claimant offered exhibits CX 1-22, and Employer offered exhibits EX 1-36.[1] CX 20, CX 21, and CX 22 were rejected (Tr. 44, 146, 148). All other exhibits were admitted into evidence (Tr. 5). After the hearing, Claimant submitted three depositions: CX 23 (Deposition of Dr. Hal Barnes), CX 24 (Deposition of Dr. Thomas K. Tsao), and CX 25 (Deposition of Dr. Nasrollah Fatehi). Employer submitted EX 37 (Deposition of Dr. Warren H. Foer)[2] and EX 38 (Deposition of Dr. Paul Mansheim). All post-hearing depositions are admitted into evidence.

The findings and conclusions that follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

The parties stipulated to and I find as follows:

1. That the parties are subject to the act.

2. That an employer/employee relationship existed at all relevant times.

3. That, on August 1, 1999, Claimant suffered an injury to his lower back that arose out of and in the course of his employment with Ceres Marine Terminal.

4. That all notices, claims, and reports that were required to be given were given in a timely fashion.

5. That Claimant's average weekly wage at the time of the injury was $1009.06, which yields a compensation rate of $672.71.

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[1] The following are references to the record:
CX - Claimant's exhibit
EX - Employer's exhibit
Tr. - Transcript of hearing

[2] Dr. Foer's deposition was submitted with the label "EX 36." However, as EX 36 already exists, I now designate the deposition as EX 37.

6. That Employer has voluntarily paid one week of compensation, $672.71, for the week of August 5, 1999 through August 11, 1999.

7. That, if the administrative law judge finds that Claimant can return to light-duty work, his earning capacity is $396.00 per week.

(Tr. 5-7, 15).

ISSUES

1. **Did Claimant's August 1, 1999 work-related injury result in a disability preventing Claimant from returning to his pre-injury job?**

2. **If so, has Employer established the availability of suitable alternative employment?**

FINDINGS OF FACT

A. Testimony of Kenneth Dawson

Claimant is a thirty-four year old graduate of Appalachian State University. He earned an undergraduate degree in pre-law and business management and graduate credits towards a masters degree (Tr. 26). He played in the National Football League from 1990 until 1993, at which time a torn hamstring forced him to quit football. He returned home to Virginia and accepted a job as a deputy in the Chesapeake Sheriff's Department, where he worked in 1994 and 1995. Claimant next worked for Ford Motor Company for two years, after which he became a longshoreman (Tr. 27).

Claimant became a scab, or nonunion longshoreman, in 1997. Eventually, he joined the union and received an "H" card. At the time he was hired, this was the lowest union card available (Tr. 28). He worked on the lashing gang for Employer. His work included lasher, gangway and deck man, slinger, and hustler driver. He did every job on the gang except crane operator and valmet operator, working between seventy and ninety hours per week (Tr. 29).

On August 1, 1999, Claimant was working as a lasher, which involves moving steel rods from containers (Tr. 30). While working, he "felt something" in his back. He continued

to work but, when he sat down for break, he could not move or stand up. He was taken to Maryview Hospital, where he underwent X-rays, a drug screening, and a breathalyzer test (Tr. 31).

Claimant told Kirby Ford, the claims manager at Ceres, that he had never had a lower back injury in his life and had always been physically fit (Tr. 32). Ford sent Claimant to Dr. Richard Holden, who gave Claimant a back brace and referred him to physical therapy (Tr. 33-4). The therapy caused pain, and Claimant actually felt worse after attending therapy (Tr. 34).

Claimant next saw Dr. Lawrence Morales, who examined his back and gave him trigger point injections (Tr. 36). Dr. Morales referred Claimant to a neurosurgeon, Dr. Fatehi, who administered a myelogram test and did not release Claimant to do any kind of work (Tr. 37-9).

On December 14, 1999, Claimant was involved in the first of two automobile accidents. He was sitting in a stopped car that was struck from behind by another vehicle (Tr. 39). The collision caused his head to snap back, causing pain in his neck. He denied that he injured his lower back in that accident, stating that only his neck and upper back were affected (Tr. 40). Before the accident occurred, his lower back was already in constant pain due to the work injury (Tr. 41). After the accident, Southside Physical Therapy treated Claimant's neck and upper back injuries (Tr. 41).

Dr. Barnes, Claimant's family physician, had been treating a bunion on Claimant's right great toe since "way before" the injury to his lower back. Due to his back problems, Claimant started to walk on the side of his foot. His right foot eventually became inflamed to the point that he could hardly stand, a problem that Claimant attributed to his altered gait (Tr. 42). Dr. Wardell surgically removed the bunion on February 15, 2000 (Tr. 44).

On November 10, 2000, Claimant was involved in a second car accident that injured his neck and upper back. He testified that this accident did not affect his lower back at all (Tr. 46). Dr. Kim Fuller, a chiropractor, treated him after that accident (Tr. 48). He also began to see Dr. Neff and Dr. Spear at that time, but Dr. Fatehi continued to treat his lower back (Tr. 49). Claimant stated that he did not complain of lower back pain to Dr. Neff or Dr. Spear (Tr. 46). Claimant had to stop seeing Dr. Spear because he could not afford the bills (Tr. 50). Three weeks prior to the hearing, he began seeing Dr. Eric Meins for his lower back (Tr. 50).

Claimant began to experience emotional problems after his first back injury (Tr. 51). He had financial problems, lost his home and nearly lost his car, and was upset that he had to depend on other people (Tr. 51). One night he went to the hospital because he had chest pains (Tr. 51). After this experience, Dr. Barnes referred him for psychiatric treatment. Claimant went to Atlantic Psychiatric and began to receive treatment from Michelle Ford, a

therapist and social worker (Tr. 54). He has also seen Dr. Thomas Tsao, a psychiatrist in the same practice (Tr. 54). Claimant did not recall having any emotional problems prior to his work injury (Tr. 55).

Claimant has not worked at all since his injury. No one at Ceres has contacted him to offer any type of light-duty position (Tr. 55). Claimant does not believe that he can perform any of the jobs listed in employer's labor market survey, either because he is not physically or psychologically capable or he does not have sufficient experience (Tr. 56-68).[3] Asked about a position as a police aide, he stated, "I'm not really trying to get back into law enforcement. I'm a longshoreman" (Tr. 63).

Claimant denied having any back problems prior to August 1, 1999 (Tr. 73). He stated that he did not remember being hit by a speaker casing on May 19, 1995 (Tr. 72). Employer's counsel produced Dr. Barnes' records of such an incident (EX 36), but Claimant continued to deny that it occurred (Tr. 76). Claimant also denied that he had ever had a problem with depression prior to his on-the-job accident (Tr. 76). Medical records from 1996 indicated that he had been treated for depression (Tr. 77). Claimant eventually admitted that, prior to his work accident, he had been hospitalized for cocaine abuse and depression (Tr. 79).

B. Testimony of Scott Hinders[4]

Hinders is a vocational expert hired by Employer (Tr. 153). He conducted a labor market survey in order to determine Claimant's wage-earning capacity. Hinders did not interview Claimant or perform testing on him because Claimant failed to attend a scheduled

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[3] Claimant testified extensively regarding his opinion of his ability to perform various jobs in the labor market survey. I will not recount Claimant's testimony here, because Claimant is not a vocational expert. Numerous doctors have testified regarding Claimant's work restrictions and ability to perform certain jobs. To the extent that Claimant is even qualified to give such testimony, it is redundant of testimony given by more qualified witnesses who took Claimant's subjective restrictions into account while forming their opinions. Claimant's subjective opinions even contradict the statements of the doctors upon whom he relies. For instance, Claimant repeatedly states that various jobs require too much standing (Tr. 57-9). Even Dr. Fatehi, who put the most stringent restrictions on Claimant, stated that he could "sit, stand and walk as much as a normal person" (CX 25, p. 21). Furthermore, Claimant stipulated to a wage-earning capacity of $396.00 per week in the event that I found that he was capable of returning to work with light-duty restrictions (Tr. 15) .

[4] Several other witnesses testified at the hearing: Mike Battle, Thomas Little, and Harvey Lawrence for Claimant and Barbara Newton for Employer. I will not summarize their testimony because nearly all of the information contained is either irrelevant or redundant. The above witnesses primarily testified about their observations of Claimant or accounts they received from Claimant about his own condition. The record contains extensive medical evidence from individuals who have more knowledge of and are more qualified to assess Claimant's condition than are these witnesses. Therefore, while I have observed and considered their evidence, there is little value in recounting it here.

meeting (Tr. 154). Hinders based his survey on information provided by Employer about Claimant (Tr. 155). Hinders reviewed the medical records and noted that some doctors indicated that Claimant could return to his pre-injury employment (Tr. 156). Dr. Morales opined that Claimant should be limited to "light-to-medium duty" work (Tr. 157). Medium duty would allow lifting of fifty pounds, while light duty would limit lifting to twenty-five pounds (Tr. 157). Hinders surveyed positions at Ceres as well as light-duty jobs away from the terminal (Tr. 158).

Hinders contacted all of the employers listed in the survey and spoke to the person directly responsible for hiring (Tr. 159). In each case, they indicated that they would consider hiring Claimant (Tr. 159). The average weekly wage of the light-duty positions was $396.00, which the parties have stipulated as Claimant's hypothetical wage-earning capacity (Tr. 159). The jobs were available in 1999-2001 and are routinely available in the labor market (Tr. 160).

C. Summary of Medical Evidence

1. Records from Maryview Medical Center, August 1, 1999 (EX 6)

On the date of Claimant's on-the-job injury, Dr. David Shulmister diagnosed lumbosacral strain. He noted the following in his report: "It is clear that if the patient did not get x-rays there would have been an large argument and I ordered X-rays despite that they were not indicated."

2. Records and Deposition of Dr. Hal Barnes (CX 17, CX 23)

Dr. Barnes has a medical degree from the University of South Carolina. He specializes in family practice (CX 23, p. 4). He has treated Claimant since October 28, 1993 and is currently his primary-care physician (CX 23, p. 5). On May 30, 1995, Dr. Barnes treated Claimant for a thoracic (middle) back injury incurred when a speaker casing fell onto his back (CX 23, p. 6). In 1996, Dr. Barnes noted that Claimant was displaying signs of depression (CX 23, p. 8). Dr. Barnes' records indicate that in January 1997 Claimant was hospitalized for "substance abuse, cocaine, lifestyle change, and depression" (CX 23, p. 22). Dr. Barnes believed that Claimant was well aware of his depression and substance abuse problems (CX 23, p. 24).

3. Records of Dr. Richard Holden (EX 1)

Dr. Holden is board certified in orthopedic surgery and is a former assistant director of orthopedic trauma at Portsmouth Naval Hospital (EX 21). He began as Claimant's treating physician on August 3, 1999, two days after Claimant's on-the-job accident. In Dr. Holden's initial examination, Claimant refused to perform a straight-leg-raising test, stating that it hurt

too much (EX 1, p. 1). Dr. Holden diagnosed a lumbosacral strain but noted that he was "concerned about some positive Waddell's test such as giving way, muscle testing in the straight leg raising test" (EX 1, p. 2).

On September 13, 1999, Dr. Holden wrote to Kirby Ford, Ceres' claims manager, stating that Claimant "has some inconsistencies and manipulation of the system." Dr. Holden noted that Claimant had "basically discharged himself" from physical therapy (EX 1, p. 4). Dr. Holden stated that Dr. Morales had written a note to the therapists stating that the therapy should not cause the patient any pain. Dr. Holden observed that this was "the most ridiculous prescription I have ever heard of in my life." He stated that Claimant displayed no motivation and significant inconsistencies. He saw no need for additional testing or therapy and recommended that Claimant return to full duty (EX 1, p. 5).

Dr. Holden examined Claimant again on November 7, 2000, when he observed that, despite complaints of constant pain, Claimant sat on the examination table for forty-two minutes without any visible sign of pain (EX 1, p. 9). Claimant was evasive in answering questions and would give full strength only when encouraged (EX 1, p. 9). His CT scan showed some bulging in the lumbar area, but the pain that Claimant reported was "way out of proportion to the rest of humanity" (EX 1, p. 10). Objective findings to support disability were "totally absent" (EX 1, p. 11). Claimant showed low effort and significant symptom magnification (EX 1, p. 11). Dr. Holden believed that Claimant could work as a longshoreman at full duty (EX 1, p. 12).

4. Records of Norfolk Physical Therapy Center (EX 5)

Norfolk Physical Therapy Center treated Claimant from August 4 through August 7, 1999 (EX 5, p. 4). According to the initial evaluation summary prepared by Susan McGann, a number of inconsistencies in testing indicated that Claimant was not giving full effort and was exaggerating his symptoms (EX 5, pp. 1-2). On August 6, Claimant cancelled all of his appointments, stating that he did not need physical therapy (EX 5, p. 3).

5. Records of the Therapy Network (EX 7, CX 13)

Claimant was seen at the Therapy Network from August 10, 1999 through September 28, 1999 (EX 7, pp. 1-7). During this time, Claimant exhibited "extremely self-limited effort" (EX 7, p. 1). Therapist Peter Owen concluded that Claimant's symptoms were disproportionate to his diagnosis and that there was no clear physiological pattern for his complaints (EX 7, p. 4). Claimant was last treated on September 10, 1999 and was discharged on September 28, 1999 due to lack of patient follow-up (CX 13, p. 2).

6. Records of Dr. Lawrence Morales (CX 2 - CX 6)

Dr. Morales treated Claimant from August 6 through November 1, 1999 (CX 2). No information regarding Dr. Morales' credentials or his speciality is in evidence. He issued disability certificates excusing Claimant from work from August 13, 1999 through September 16, 1999 (CX 4 through CX 6). He also wrote a prescription, apparently to the physical therapists treating Claimant, which stated that "under no circumstances should your rehab cause the patient pain!!!" (CX 3).

Dr. Morales treated Claimant for back pain and prescribed a number of injections (CX 2). Dr. Morales examined Claimant's MRI and found evidence of L4 exiting nerve root foramina narrowing and effacement (CX 2i). On October 19, 1999, Dr. Morales indicated for the first time that Claimant was capable of "light to medium duty work" (EX 2b). He repeated this opinion on November 1, 1999 and referred him to Dr. Fatehi for completion of his treatment (CX 2a).

7. Records and Deposition of Dr. Nasrollah Fatehi (CX 1, CX 25)

Dr. Fatehi attended medical school in Iran, did a five year residency in neurosurgery at George Washington University, and then served as chief of neurosurgery for the Imperial Medical Center of Iran. He worked in private practice in Iran before returning to the United States in 1985 (CX 25, p. 5). He testified that he is board certified, but he did not specify what certifications he holds (CX 25, p. 5).

Dr. Fatehi first examined Claimant on September 20, 1999. He diagnosed subacute lumbar sprain and constitutional borderline lumbar canal stenosis and degenerative changes of the L3-L4 and L4-L5 discs (CX 1g). Dr. Fatehi did not believe that the degeneration was related to the work-related injury because such degeneration was unlikely in such a short period of time (CX 25, p. 30). Stenosis, which causes a narrow spinal canal, is a congenital problem that exists from the patient's birth. However, stenosis only causes problems if there is degeneration and bulging of discs. Furthermore, a patient with disc degeneration and stenosis is prone to develop symptoms much earlier than a patient with the same degree of disc degeneration and a normal spinal canal (CX 25, p. 33). A traumatic injury can cause further bulging of the discs, which can worsen the symptoms of stenosis (CX 25, p. 58).

Addressing the issue of symptom magnification, Dr. Fatehi stated:

> I don't know if he has exaggerated his symptoms or not . . . I am not able to judge that and I don't think any physician would be able to say a patient is exaggerating the complaints. A patient may exaggerate during examination, but not regarding complaints. Pain is subjective and I take it as the patient tells me.

(CX 25, p. 15).

However, Dr. Fatehi thought it unlikely that a patient would subject himself to unnecessary epidural injections or myelograms because the procedures are "scary" and "painful" (CX 25 pp. 9, 11).

Dr. Fatehi agreed that Claimant's foot surgery was "totally unrelated to anything here" (CX 25, p. 35).

Dr. Fatehi concluded that Claimant "can sit, stand, and walk as much as a normal person could . . . [H]e should be able to do six to eight hours of light duty as his maximum capacity" (CX 25, p. 21).

8. Records and Deposition of Dr. Warren Foer (EX 3, EX 23, EX 37)

Dr. Foer graduated from George Washington University Medical School and is board certified in neurological surgery (EX 23). On November 3, 1999, he reviewed Claimant's medical records at the request of ROI Rehabilitation Consultants (EX 3, p. 4). Based on the X-rays, Dr. Foer found pre-existing (before the accident) degenerative disc disease of the lumbar spine. He found no physical evidence that would prevent Claimant from returning to gainful employment (EX 3, p. 7).

On July 5, 2000, Dr. Foer examined Claimant on referral from Dr. Fatehi (EX 3, p. 1). Dr. Foer again concluded that Claimant's degenerative disc changes were pre-existing, noting that such conditions take years to develop (EX 37, p. 11). Claimant's constitutional spinal stenosis is a natural, non-work related condition, and Dr. Foer found no radiographic evidence that the work injury aggravated or contributed to Claimant's stenosis (EX 37, p. 13). He opined that Claimant's disc disease was not related to the work injury, although he noted that a traumatic incident can aggravate degenerative disc disease (EX 37, p. 34).

Dr. Foer noted that Claimant had "disproportionate pain reactions" during his examinations, in that:

> there was no correlation between the degree of pressure applied to the spine and the amount of pain reproduced. . . [E]ven the lightest touch would reproduce complaints of severe pain. Simulated movements that would not actually produce compression or torque changes on the spine would produce complaints of pain as if the spine had actually been moved.

(EX 37, p. 6). Claimant showed no atrophy, which Dr. Foer would expect to see if there were actual compression changes and damage to nerve roots (EX 37, p. 8). Claimant also reported no significant benefit from trigger point injections, which is consistent with nonorganic complaints (EX 37, p. 17). Dr. Foer concluded that the patient may have been motivated by secondary gain (EX 3, p. 2).

9. Records of Dr. Edward Irby (EX 2, EX 22)

The Department of Labor referred Claimant to Dr. Irby, a board-certified orthopedist, for an independent medical examination (EX 2, EX 22). Dr. Irby examined Claimant on December 1, 1999, and determined that he showed inconsistencies, nonphysiologic findings, and signs of malingering (EX 2, p. 5). Dr. Irby concluded that Claimant was capable of returning to work and referred him for a functional capacity examination (FCE) to determine his abilities (EX 2, p. 5). On November 11, 2000, after reviewing the FCE results, Dr. Irby reaffirmed his conclusion that Claimant was capable of working. Dr. Irby approved several jobs for Claimant, including slinger, hustler driver, ground man to assist top loader, top loader, reach stack operator, forklift operator, wenchman and gangwayman (EX 2, p. 8).[5] Dr. Irby concluded that Claimant had reached maximum medical improvement and would not benefit from further treatment (EX 2, p. 8).

10. FCE Report (EX 10)

Paul Murray, a physical therapist at Hampton Physical Therapy, conducted Claimant's FCE on November 2, 2000. He concluded that:

> Overall test findings, in combination with clinical observations, suggest the presence of sub-maximal effort. In describing sub-maximal effort, this evaluator is by no means implying intent. Rather, it is simply stated that Mr. Dawson can do more physically at times than was demonstrated during this testing day. . .
> Recommendations: The client is not a candidate for any type of physical rehabilitation at this time due to demonstration of submaximal effort and symptom magnification syndrome.

(EX 10, p. 1).

11. Records of Michelle Ford, Licensed Clinical Social Worker, Atlantic Psychiatric Services (CX 9, CX 10)

Michelle Ford provided Claimant with psychotherapy services beginning on October 12, 1999. On that date, he suffered an anxiety attack. He reported that he felt stressed and hopeless due to lack of workers' compensation for a job-related back injury (CX 10a). The records of Claimant's treatment by Ford indicate that his initial session dealt with problems that Claimant was having with his girlfriend, back problems, and lack of compensation (CX 9). On August 16, 2000 Ford opined that Claimant would have returned to work if he had

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[5] The gangway job was included in Claimant's description of his pre-injury duties (Tr. 29). Because Dr. Irby approved this job, and because he did not place any restrictions on Claimant, I conclude that Dr. Irby believed Claimant capable of returning to his pre-injury duties (EX 2, EX 22).

been physically capable (CX 10a).

12. Records and Deposition of Dr. Thomas Tsao (CX 11, CX 24)

Dr. Tsao is a physician at Atlantic Psychiatric Services with a medical degree from Hahnemann Medical University (CX 24, p. 4). He is certified by the American Board of Psychiatry and Neurology (CX 11d). He examined Claimant on November 10, 2000, taking the case pro bono at the request of Michelle Ford (CX 24, p. 15).

Dr. Tsao wrote a letter to Claimant's attorneys on December 30, 2000, describing his assessment of the patient (CX 11). Dr. Tsao noted that Claimant's medical history prior to his back injury was "unremarkable and noncontributory" (CX 11b). He stated that Claimant "basically denied any drug experimentation or usage" (CX 11d). Dr. Tsao diagnosed adjustment disorder with depressive mood and anxiety, stating that with time this condition had developed into a major depressive episode (CX 11d).

Dr. Tsao concluded that Claimant:

> has shown a pattern of hard work, high levels of responsibility, and considerable success in life. . .It seems clear that he is a man who has taken pride in his hard work and accomplishments right up and through his injury while working [for Employer]. . . I can document that Mr. Dawson has clearly suffered emotionally as evidenced by his ongoing treatment and antidepressant medication.

(CX 11d).

Dr. Tsao attributed Claimant's depression to a loss of "his own sense of physical integrity" because he could no longer make a living. He opined that the Claimant, a former professional athlete, would suffer particular psychological effects when his body was damaged (CX 24, pp. 33-4). Dr. Tsao also connected Claimant's mental health problems to his injury because of the timing (CX 24, p. 36). He believed that Claimant had no previous history of psychiatric disorders and had never been treated by a mental health professional prior to August 1999 (CX 24, p. 35), stating:

> [Claimant] has no family history that would predict he would ever see a psychiatrist, psychologist, or social worker, licensed clinical social worker, and he ends up in treatment. And it all occurs after. . . August 1, 1999.

(CX 24, p. 36).

Dr. Tsao believed that Claimant could not work due to his mental condition, stating, "I don't think anybody could go to work in that state of mind" (CX 24, p. 40).

Dr. Tsao said that Dr. Mansheim is "a genius" and "brilliant" (CX 24, p. 43). Dr. Tsao did not believe that Claimant was malingering because he had an average IQ and was not "sophisticated enough" to malinger. Dr. Tsao also opined that he did not believe Claimant would take psychological medications such as Zoloft and BuSpar if nothing was wrong (CX 24, p. 46).

Dr. Tsao was not aware when he formed his opinion that Claimant had been hospitalized for depression and substance abuse. Dr. Tsao admitted that this information might change his opinion (CX 24, p. 57). However, he observed that Claimant was not treated between 1997 and 1999, which would suggest that he "was treated and did well" (CX 24, p. 78)

13. Records and Deposition of Dr. Paul Mansheim (EX 9, EX 24, EX 38)

Dr. Mansheim is a psychiatrist with a medical degree from the University of Wisconsin. He holds the following certifications: 1) American Board of Psychiatry and Neurology in General Psychiatry, 2) American Board of Psychiatry and Neurology in Child Psychiatry, and 3) American Board of Forensic Psychiatry. He has added qualifications from the American Board of Psychiatry and Neurology in 1) addiction psychiatry, 2) forensic psychiatry, and 3) child psychiatry (EX 24, p. 2).

Dr. Mansheim examined Claimant on November 21, 2000. In order to avoid being prejudiced, he did not review Claimant's records prior to the examination (EX 38, p. 6). Upon reviewing the records after the examination, Dr. Mansheim noted that Claimant had provided misinformation on several issues. He had told Dr. Mansheim that he did not leave professional football because of an injury, when in fact he did (EX 38, p. 8). Claimant also failed to inform Dr. Mansheim of his prior drug abuse and drug treatment (EX 38, p. 8).

Based on his interview, Dr. Mansheim concluded that Claimant was malingering. Asked to explain this diagnosis, Dr. Mansheim stated that Claimant did not have a psychiatric disorder that was connected to his accident (EX 38, p. 9). He concluded that Claimant could return to work without any psychiatric restriction (EX 9, p. 18). He noted that:

> [Claimant's] anger appears to be mainly anger that he did not receive Worker's Compensation. In my opinion this is not evidence of a psychiatric condition related to his back injury as much as it is evidence of an individual who is angry that he did not receive compensation.

(EX 9, p. 18).

Dr. Mansheim reached his conclusion because he found that many of Claimant's statements were untruthful. Claimant's concealment of his history of prior psychiatric treatment and drug abuse are consistent with malingering (EX 38, p. 27). Claimant's

statements about wanting to return to work were not consistent with his failure to follow through with medical treatment and his unwillingness to tolerate pain in physical therapy (EX 38, p. 31). Claimant spoke of his desire to get back into football and become a scout, but Dr. Mansheim believed that this would not be a physically stressful position and that there was nothing preventing Claimant from performing it (EX 38, p. 33). Dr. Mansheim also noted that Claimant's first interview with Michelle Ford primarily addressed his legal problems and difficulties. He stated that:

> . . . it just seemed to me that if you were going to see somebody for therapy because you were so upset about your work related injury that what would be on the top of your head would be all your problems with your work-related injury.

(EX 38, p. 35).

DISCUSSION

Claimant argues that he is entitled to temporary total disability benefits and/or medical benefits based on alleged physical injuries to his back and foot, as well as psychological injuries.

I. Back Injury

Although the burden of demonstrating causation is on Claimant, he may be aided by a presumption in section 20(a) of the act, which provides that "in any proceeding of enforcement of a claim for compensation under this act, it shall be presumed, in the absence of substantial evidence to the contrary - (a) that the claim comes within the provisions of the act." 33 U.S.C. 920(a).

However, Claimant has the burden of proving the nature and extent of his disability without the benefit of this presumption. Holton v. Independent Stevedoring Co., 14 BRBS 441 (1981); Carroll v. Hanover Bridge Marina, 17 BRBS 176 (1985). The act defines "disability" as "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment. " 33 U.S.C. §§ 902(10). Therefore, Claimant must prove by a preponderance of the evidence that he has suffered an injury that prevents him from returning to his regular employment. Carroll at 145. I find that Claimant has not shown that he suffered a disability as a result of any alleged back injury.

Dr. Holden, Dr. Irby, and Dr. Foer - two orthopedists and a neurologist, all board certified, examined Claimant personally and concluded that he was capable of returning to work without restrictions (EX 1, p. 12; EX 2, p. 8; EX 3, p. 7). The records of Claimant's physical therapists and the results of his functional capacity evaluation support the conclusion

that Claimant was exhibiting submaximal effort and symptom magnification (EX 5, EX 7, EX 10, p. 1).

On the other hand, Dr. Morales concluded that Claimant was capable of light-to-medium-duty work (EX 2b), and Dr. Fatehi found that he was capable only of light-duty work (CX 25, p. 21).

In weighing the opinions of the physicians, I can give little weight to the opinion of Dr. Morales, who was Claimant's treating physician from August 6, 1999 through November 1, 1999 only. In this relatively brief period, he could have had little time to observe Claimant, and, therefore, the rationale for crediting him as treating physician is not strong (CX 2). Dr. Morales' credentials, specialty, and certification are not in the record, and his records do not explain the reasoning behind his opinion that Claimant was disabled (CX 2 - CX 6). Furthermore, Dr. Morales undermined his own credibility by stating the physical therapy should not cause a patient pain under any circumstances (CX 3). This statement defies experience and common sense, and Dr. Holden went so far as to call it "the most ridiculous prescription [that he had] ever heard of" (EX 1, p. 5).

Likewise, I can give little weight to Dr. Fatehi's opinion. Although he testified that he is board certified, the record did not indicate what certifications he has received or who issued them (CX 25, p. 5). Furthermore, Dr. Fatehi admitted that he relied on Claimant's subjective report of his symptoms and did not attempt to determine whether Claimant was telling the truth (CX 25, p. 15). In fact, he opined that a physician cannot determine whether a patient is exaggerating his complaints (CX 25, p. 15). Claimant's numerous inconsistent statements, particularly regarding prior back injuries and prior drug use, call Claimant's credibility into serious question. However, Dr. Fatehi refused to render an opinion about the legitimacy of Claimant's complaints, and because Claimant must show that his complaints are legitimate without benefit of the section 20(a) presumption, Dr. Fatehi's evidence has very low probative value on this issue.

Dr. Holden, Dr. Foer, and Dr. Irby are well qualified specialists whose credentials appear in the record (EX 21, EX 22, EX 23). All three explained in detail their reasons for discrediting Claimant. Dr. Holden noted Claimant's refusal to cooperate in physical therapy (EX 1, p. 4), his ability to sit still with no visible signs of pain (EX 1, p. 9), his low effort in physical testing (EX 1, p. 9), and his reports of pain "out of proportion to the rest of humanity" (EX 1, p. 10).

Dr. Foer noted disproportionate pain reaction, including reaction to simulated movements that did not actually affect the spine (EX 37, p. 6). Claimant reported no benefit from trigger point injections, and he showed no muscle atrophy. Dr. Foer considered both of these observations to be consistent with "nonorganic" complaints, and he believed that Claimant might be motivated by "secondary gain" (EX 37, p. 8).

Dr. Irby also noted inconsistent findings and signs of malingering (EX 2).

These are all well reasoned opinions. Weighing their opinions against the poorly reasoned opinions of Dr. Morales and Dr. Fatehi, I find that Claimant has not proven that he suffered any disability to his back. Therefore, Claimant is entitled to no compensation for lost earnings due to the injury.

I also find that Claimant is not entitled to medical benefits. In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539(1979). Claimant has not shown that any of the treatments he received for his back were reasonable or necessary. On the date of Claimant's alleged injury, the emergency room doctor noted that he requested X-rays in order to avoid an argument, despite his medical opinion that X-rays were not indicated (EX 6). Thus, from the day of his alleged injury, Claimant showed a pattern of seeking unnecessary medical treatment.

I have credited the opinions of Drs. Holden, Foer, and Irby, all of whom opined that Claimant was malingering or exaggerating his symptoms. There was no objective basis for Claimant's continuing treatment beyond his own complaints. Claimant suffered from stenosis and degenerative discs, but there is no evidence that these conditions would have required treatment absent Claimant's subjective complaints of pain (CX 1g, CX 25, p. 15).

Furthermore, even if Claimant's stenosis and disc condition did require treatment, Claimant has not shown a causal link between his injury and these objective conditions. Dr. Fatehi stated that a traumatic injury may degenerative disc disease, which may in turn aggravate stenosis (CX 25, p. 58). This statement is sufficient to raise the section 20(a) presumption on the issue of causation. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981).

However, Dr. Foer stated that Claimant's disc disease was not work related, noting that there was no radiographic evidence and that the condition takes years to develop (EX 37, pp. 11, 13). This statement constitutes substantial evidence sufficient to rebut the section 20(a) presumption. Ranks v. Bath Iron Works Corp., 22 BRBS 301, 305 (1989); Romeike v. Kaiser Shipyards, 22 BRBS 57, 59 (1989).

Therefore, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. See, e.g., Leone v. Sealand Terminal Corp., 19 BRBS 100, 102 (1986); Del Vecchio v. Bowers, 296 U.S. 280, 286 (1935); Volpe v. Northeast Marine Terminals, 671 F.2d 697, 700 (2d Cir. 1981). Weighing the evidence as a whole, I credit Dr. Foer's statement that the disc disease is not work related. As I have already found, Dr. Foer's qualifications are in the record and his opinion is better reasoned than that of Dr. Fatehi. Furthermore, Dr. Fatehi did not cite any evidence that a work-related event aggravated Claimant's disc disease but only stated that it could have done so. Therefore, Dr. Foer's opinion is more persuasive, and Claimant has not shown that he is entitled to medical expenses for treatment of his disc disease.

II. Foot surgery

Claimant alleges that the injury to his back caused him to alter his gait, which aggravated a pre-existing bunion problem to the point where it required surgery (Tr. 42-4). Employer moved to strike portions of Claimant's brief that addressed this allegation, arguing that Claimant did not raise this issue prior to the hearing. I grant the motion. Claimant's answers to interrogatories did not mention the bunion surgery (Ex. A to Employer's motion to strike). Claimant's counsel did not argue at the hearing that the surgery was related to Claimant's injury, nor was the hearing expanded to consider this new issue. See 20 C.F.R. 702.336(b). Only Claimant's offhand remarks during his testimony suggested any link between his back injury and his bunion problems (Tr. 42-4). For Claimant to raise this issue for the first time at the briefing stage unfairly prejudices Employer.

Even if I were to consider this issue, Claimant's testimony alone would be insufficient to invoke the presumption of causation under section 20(a). Kelaita, supra. There is no evidence that Claimant has any medical expertise. His unsupported opinion that his altered gait aggravated his foot problems should not invoke the presumption. This is particularly true given Claimant's inconsistency and lack of credibility throughout his testimony.

III. Psychological Injuries

Claimant is entitled to the section 20(a) presumption regarding his psychological injuries. It is undisputed that Claimant suffered from psychological problems that required treatment, including an October 12, 1999 anxiety attack (CX 10a). Therefore, Claimant has suffered some injury within the meaning of section 20(a). Kelaita, supra.

Michelle Ford, the social worker who treated Claimant for over a year, considered his back injury and lack of compensation to be a contributing cause of his problems (CX 9). Dr. Tsao, a psychiatrist, opined that a physical injury could cause particular psychological damage to Claimant because of his past as an athlete (CX 24, pp. 33-4). These statements taken together allow Claimant to invoke the presumption in section 20(a). Kelaita, supra.

Dr. Mansheim's opinion constitutes substantial evidence to rebut the presumption. Ranks, supra. He opined that Claimant was malingering in the sense that he did not have a work-related psychological injury (CX 37, pp. 9, 27). Dr. Mansheim noted Claimant's concealment of his prior drug use and prior psychiatric treatment and his failure to follow through in therapy as being inconsistent with his claims that he wanted to receive

treatment and return to work (CX 38, pp. 31-3). Dr. Mansheim determined that Claimant's anger was not due to an injury but to his failure to receive workers' compensation (EX 9, p. 18).

Because Employer has rebutted the section 20(a) presumption, I must now weigh the evidence as a whole. Leone, supra. I credit Dr. Mansheim over Ms. Ford and Dr. Tsao. Dr. Mansheim is the most qualified medical professional to testify regarding Claimant's mental health. He is a psychiatrist, while Ms. Ford is a social worker, and he is board-certified in more areas than is Dr. Tsao (EX 24, CX 11d). Even Dr. Tsao, who disagreed with Dr. Mansheim's opinion, acknowledged the latter to be "a genius" (CX 24, p. 43).

Furthermore, the opinions of Ms. Ford and Dr. Tsao are both based on the premise that Claimant suffered a disabling physical injury. Ms. Ford stated that Claimant's loss of work and compensation contributed to his depression but that he could return to work if he were physically healthy (CX 10a). Dr. Tsao opined that Claimant's loss of physical health and ability to make a living led to his depression (CX 24, pp. 33-4). As I have found in sections I and II above, Claimant has not shown that he actually sustained physical disabilities for any injuries. Therefore, the premise shared by Dr. Tsao and Ms. Ford was incorrect.

The Board has held that a psychological injury resulting from a legitimate personnel action is not compensable under the LHWCA because to hold otherwise would unfairly hinder an employer in making legitimate personnel decisions and in conducting its business. Marino v. Navy Exchange, 20 BRBS 166, 168 (1988). Because Employer legitimately denied liability for Claimant's alleged back injury, a psychological injury due to the justified denial of his compensation and to his consequent loss of income is not compensable.

Dr. Tsao based his theory of causation on the additional incorrect assumption that Claimant had no previous need for psychological treatment (CX 24, pp. 34-6). In fact, Claimant had been treated and even hospitalized for depression and substance abuse prior to his on-the-job accident (CX 23 p. 22). Therefore, the two main premises of Dr. Tsao's diagnosis - that Claimant suffered a debilitating physical injury and that he had not received prior psychological treatment - either have not been proven by Claimant or are blatantly false. This further decreases the credibility of Dr. Tsao's opinion to a significant degree.

On the other hand, Dr. Mansheim, did not rely on any incorrect premises in reaching his conclusion. He reviewed extensive medical records while preparing his opinion (EX 9 - EX 14). He considered Claimant's inconsistent statements and his prior history of psychological treatment in reaching the conclusion that Claimant's work-related injury did not contribute to any psychological problems that he may have had (EX 37, pp.

9, 18, 27). Based on these facts and Dr. Mansheim's superior qualifications, I credit his opinion above those of Ms. Ford and Dr. Tsao. Therefore, I find that Claimant has not shown that he suffered any psychiatric disability related to his work, nor is he entitled to medical benefits for psychiatric treatment.

ORDER

It is hereby ORDERED that the claim of Kenneth Dawson for benefits under the act is DENIED.

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FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

FEC/cmp
Newport News, Virginia

NOTE: The outcome of this case does not constitute a "successful prosecution" within the meaning of the act. Claimant and Employer are not liable to Claimant's counsel for any attorney's fees for services rendered, either before this office or that of the district director, in connection with this claim. 33 USC 928; Director, OWCP v. Hemingway Transport, Inc., 1 BRBS 73, 75 (1974). *Actual or attempted receipt of attorney's fees for an unsuccessful prosecution may be a violation of federal criminal statutes and may be grounds for debarring an attorney from pursuing any claim before the United States Department of Labor.* 33 USC 928 (e), 931 (a), (b)(2)(B)(ii); 20 CFR 702.131 (c)(2), 702.432-702.436. Any such actual or attempted receipt of fees should be promptly reported to this office or the district director. However, if Claimant's counsel believes that a good faith claim exists for attorney's fees in this matter, a petition should be filed with the office before which the work was performed.